constitutionality of Commerce Clause legislation."[12] The Court further noted, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[13] Based on its review of all four considerations, *Morrison* found that the Commerce Clause did not provide Congress with the authority to enact section 13981.

***Lopez* and *Morrison* applied to Petitioner's case**

In Petitioner's case, Congress has sought to indefinitely regulate purely local activity in 18 U.S.C. § 842(h). Section 842(h) does not regulate the use or instrumentalities of interstate commerce. Mere possession of an explosive in one's house, similar to possession of a firearm in a school zone, does not arise out of and is not connected to commercial transactions. Because section 842(h) regulates local, intrastate storage of stolen explosives without concern whether that storage substantially affects interstate commerce, it is unconstitutional.

In applying the *Morrison* factors, the most important are whether the activity was economic and whether the link to interstate commerce is attenuated. The existence of a jurisdictional element and legislative findings are ordinarily not, in themselves, dispositive.[14]

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[12] *Id.*

[13] *Id.* (quoting *Lopez*, 514 U.S. at 557, n.2).

[14] *United States v. McCoy*, 323 F.3d 1114, 1120 (9th Cir. 2003).

1. The offense that Petitioner pleaded guilty to does not regulate commerce or any sort of economic activity.

Lopez's review of Commerce Clause case law demonstrates that in those cases where the Court has sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic activity.[15] "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far."[16] This Court in *Gonzales v. Raich*, reaffirmed the principle that the regulated activity be economic.[17]

The Ninth Circuit considered section 842(h) after *Lopez* in the unpublished case of *United States v. Mikels*.[18] *Mikels* found that section 842(h) does, in part, regulate commercial activities.[19] The court also noted that section 842(h) was part of a larger scheme regulating all aspects of the importation, manufacture, and storage of explosive materials.[20] The court concluded that the overall statutory scheme was aimed at the legitimate goal of regulating the national market in explosives.[21] The lower court also applied this reasoning.[22]

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[15] *Morrison*, 529 M.J. at 611.

[16] *Lopez*, 514 U.S. at 559-560.

[17] 125 S. Ct. 2195, 2205, 2211 (2005).

[18] *United States v. Mikels*, 1997 U.S. App. LEXIS 5967 (9th Cir. 1997).

[19] No. 96-10204, 1997 U.S. App. LEXIS 5967, *4 (9th Cir. Mar. 26, 1997).

[20] *Id.*

[21] *Id.* at *4-5.

[22] App. A, *infra*, at 11a – 12a.

While section 842(h) does prohibit commercial activities such as selling and bartering, Petitioner was convicted solely of storing stolen explosives. The act of storage alone – the only act that Petty Officer Disney was convicted of – entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace.[23]

Black's Law Dictionary defines economics as "[t]he social science dealing with the production, distribution, and consumption of goods and services."[24] Webster's second definition of economic is "of or having to do with the production, distribution, and consumption of wealth."[25] Webster's further defines consumption as "the using up of goods or services, either by consumers or in the production of other goods."[26] The activity prosecuted in this case under was very narrow: the mere local, intrastate *storage* of stolen explosives. Storage alone does not deal with production, distribution, or consumption. Petty Officer Disney's activity was non-economic in nature. And this Court noted that federal regulation of intrastate activity has been sustained when the "activity in question has been some sort of economic endeavor."[27] *Gonzales* distinguished its treatment of medical marijuana from *Lopez* and *Morrison* using this exact analysis - by examining the definition of economic and

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[23] *See United States v. Maxwell*, 386 F.3d 1042, 1056 (11th Cir. 2004) (possession of child pornography alone non-economic under *Morrison*).

[24] Black's Law Dictionary 531 (7th ed. 1999).

[25] Webster's New World College Dictionary 429 (3th ed. 1996) (the first definition is "of or having to do with the management of the income, expenditures, etc. of a household, business, community, or government").

[26] Webster's New World College Dictionary 300 (3th ed. 1996).

[27] *Morrison*, 529 U.S. at 611.

determining that the growing and use of medical marijuana was economic.[28] But here there is simply no economic or commercial activity here that is regulated by the intrastate storage of stolen explosives in violation of section 842(h).

2. The link between the regulated activity and a substantial effect on interstate commerce is too attenuated and unsubstantiated.

The universe of that which can be regulated under the Commerce Clause must "substantially affect" interstate commerce.[29] Although individual instances of economic activity may not by themselves substantially affect interstate commerce, their aggregation may.[30] *Morrison*, however, rejects non-economic aggregation, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[31] In both *Lopez* and *Morrison*, this Court rejected "costs of crime" and "national productivity" arguments that would justify the statutes because the link to any substantial effect on interstate commerce was too attenuated.[32]

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[28] *Gonzales*, 125 S. Ct. at 2211.

[29] *Lopez*, 514 U.S. at 558.

[30] *Wickard v. Filburn*, 317 U.S. 111 (1942) (using an aggregation analysis when looking at private consumption of wheat).

[31] *Morrison*, 529 U.S. at 613; *see also Raich v. Ashcroft*, 352 F.3d 1222, 1231 (9th Cir. 2003) (growth and use of medicinal marijuana not commercial and *Wickard*'s aggregation analysis inapplicable); *McCoy*, 323 F.3d at 1122 (possession of a single pornographic picture of a child non-economic and non-commercial and not analogous to aggregation in *Wickard*).

[32] *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 613-14.

In *Lopez*, this Court refused to adopt the tortured logic that justified the Gun-Free School Zones Act: violence affects schools, and schools train tomorrow's work force, and therefore guns near school zones affect "national productivity."[33] To support a connection to interstate commerce, the government would have to rely on the similarly tortured logic that Petitioner's storage of a small amount of stolen explosives in his private garage had a substantial affect on interstate commerce. Substantial effects should not be speculative, attenuated, trivial, remote or indirect. Rather, they must be explicit, direct, and of course, substantial. Here, government cannot point to explicit, direct, and substantial effects to interstate commerce that are linked to Petty Officer Disney's purely local, intrastate storage of stolen explosives in his garage. Instead, the lower court rationalizes a connection to interstates commerce by invoking the specter of terrorism.[34] This reasoning boils down to the simple formula: Explosives can be used in crimes, crimes are bad for the economy, and therefore, explosives affect interstate commerce. This sort of cost-of-crime reasoning was specifically rejected by *Lopez*.[35]

3. Section 842(h)'s legislative history does not support a finding that the regulated activity substantially affects interstate commerce.

The question whether there is an impact on commerce is one for the courts. "It is not the mere existence of legislative findings that is determinative."[36] Congressional findings alone are insufficient to make a statute constitutional

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[33] *Lopez*, 514 U.S. at 564.
[34] App. A, *infra*, at 13a.
[35] 514 U.S. at 564.
[36] *McCoy*, 323 F.3d at 1127.

under the Commerce Clause.[37] Rather, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question. . . ."[38] It is "emphatically the province and duty of the judicial department to say what the law is."[39]

Section 842(h) was passed initially as part of the Organized Crime Control Act of 1970. Its jurisdictional element was added after *Lopez* as part of the Antiterrorism and Effective Death Penalty Act of 1996. Both the Organized Crime Control Act of 1970 and the Antiterrorism and Effective Death Penalty Act of 1996 have extensive legislative history. However, Petitioner could find no specific congressional findings linking section 842(h) with interstate commerce. But Congress did explain its purpose in passing 18 U.S.C. § 844(i) in House Report No. 91-1549, 91st Cong., 2d Sess. (1970), Organized Crime Control Act of 1970:

> Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation. The absence of any effective State or local controls clearly attest to the urgent need to enact strengthened Federal regulation or explosives.
>
> . . .
>
> Its purpose is to protect interstate and foreign commerce against interference and interruption by reducing the hazards to persons and property arising from explosives

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[37] *Morrison*, 529 U.S. at 614.

[38] *Id.*

[39] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

> misuse and unsafe or insecure storage. It is also intended to assist the States effectively to regulate explosives distribution within their borders . . . .[40]

While this may be evidence that Congress considered the trafficking of explosives as substantially affecting interstate commerce, it does not make the link that mere storage of explosives substantially affects interstate commerce. The overall purpose of the Organized Crime Control Act was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[41] This is the very sort of attempt at a general police power prohibited by *Lopez*.[42]

As this Court has noted, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[43] Although the legislative history suggests that Congress believed that a link between explosives and a substantial effect on interstate commerce existed, the crux of the analysis is whether there really is a substantial effect on interstate commerce. Congress cannot simply make it so by making findings.[44] The only justification to regulate intrastate activity that does not affect the channels or instrumentalities

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[40] 1970 U.S.C.C.A.N. 4013; *see also United States v. Sweet*, 548 F.2d 198, 200 (7th Cir. 1977) (discussing the legislative history of section 844(i)).

[41] Pub. L. No. 91-452, 84 Stat. 923 (1970).

[42] 514 U.S. at 564.

[43] *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557, n.2).

[44] *Morrison*, 529 U.S. at 614.

of interstate commerce is if the activity has a substantial affect on interstate commerce.[45]

4. The jurisdictional element in section 842(h) alone is insufficient to establish a substantial effect on interstate commerce.

Section 842(h) does contain an express jurisdictional element, but that element alone does not establish a link between to prohibited conduct and a substantial effect on interstate commerce.

Prior to the *Lopez* decision, section 842(h) did not contain a jurisdictional element. It read:

> It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen.[46]

In 1996, the statute was amended to include a jurisdictional element:

> It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to

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[45] *Lopez*, 514 U.S. at 559.

[46] 18 U.S.C. § 842(h) (1994) (originally passed as part of the Organized Crime Control Act of 1970).

believe that the explosive materials were stolen.[47]

In statute in question in *Lopez*, lacked a jurisdictional element that might have saved the statute.[48] However, even if a statute prohibiting possession or storing contraband has a jurisdictional element, there still must be a nexus between the prohibited conduct and interstate commerce.[49] That nexus must be more than the mere fact that the contraband traveled in interstate commerce at some point in time.[50] The required nexus must be that the proscribed activity "substantially affects" interstate commerce.[51]

This jurisdictional-element dictum in *Lopez* was intended to ensure that the limits of federalism were observed, not to introduce a novel means of circumventing those limitations. A "hard and fast rule upholding a statute's constitutionality under the Commerce Clause whenever a jurisdictional element was present would ignore the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated that there may be no substantial effect on interstate commerce [52]

This Court has never intimated that the mere presence of a jurisdictional element would somehow insulate all federal action taken under the statute from constitutional challenge. Furthermore, *Morrison* described the

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[47] 18 U.S.C. 842(h) (as amended April 24, 1996, 104 Public Law 132, Title VI. § 603, Title VII, Subtitle A, § 707, 110 Stat. 1289, 1296) (part of the Antiterrorism and Effective Death Penalty Act of 1996)).

[48] *Lopez*, 514 U.S. at 564.

[49] *Lopez*, 514 U.S. at 561-62 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

[50] *Id.*

[51] *Id.*

[52] *McCoy*, 323 F.3d at 1126.

jurisdictional element as one of four considerations it looked to when determining the viability of a statute under the substantial affects analysis.[53]

At least two Circuit Courts of Appeals have held statutes unconstitutional as applied even where there was a jurisdictional element. In *U.S. v. McCoy*, the Ninth Circuit considered an as applied challenge to 18 U.S.C. § 2252(a)(4)(B) (possession of visual depictions of minors engaged in sexual explicit conduct).[54] Section 2252(a)(4)(B) contained an express "jurisdictional hook" intended to satisfy Commerce Clause concerns.[55] "The purpose of the jurisdictional hook is to limit the reach of a particular statute to a discrete set of cases that substantially affect interstate commerce."[56] The Ninth Circuit found that the jurisdictional hook in question failed to limit the reach of the statute all, as it encompassed virtually every case imaginable.[57] The Supreme Court's decisions in *Lopez* and *Morrison*, however, reject the view that "a jurisdictional element, standing alone, serves to shield a statute from constitutional infirmities under the Commerce Clause."[58]

The Eleventh Circuit in *United States v. Maxwell*, considered the jurisdictional element of 18 U.S.C. § 2252A (possession of child pornography) merely to be "directed at overcoming the legal hurdle of obtaining federal jurisdiction, rather than an aspect of the primary subject matter Congress wishes to control."[59] The court went on to dismiss the jurisdictional element, "We decline the invitation to permit

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[53] *Morrison*, 529 U.S. at 611.
[54] 323 F.3d 1114 (9th Cir. 2003).
[55] *Id.* at 1124.
[56] *Id.* (quoting *Morrison*, 529 U.S. at 611-12, citing *Lopez*, 514 U.S. at 562).
[57] *Id.* at 1124.
[58] *McCoy*, 323 F.3d at 1125.
[59] 386 F.3d 1042, 1058 (11th Cir. 2004).

Congress to achieve power beyond its constitutional reach simply by uttering pretextual incantations evoking the phantasm of commerce."

Summary

Because Petty Officer Disney's storage of stolen explosives was non-economic and had too attenuated a link to interstate commerce, there was no substantial effect on interstate commerce. Neither the jurisdictional element nor any legislative findings can save the statute as applied to Petty Officer Disney because the requirement that the regulated conduct substantially affect interstate commerce cannot be met. Therefore, 18 U.S.C. § 842(h) is unconstitutional on its own and as applied to Petitioner. Congress' attempt to regulate conduct such as Petitioner's is an unconstitutional expansion of its power under the Commerce Clause. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[60]

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[60] *Marbury v. Madison*, 5 U.S. at 176.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee v.
Walter D. DISNEY, Hospital
Corpsman First Class, U.S. Navy,
Appellant

No. 05-0068

UNITED STATES COURT OF
APPEALS FOR THE ARMED
FORCES

62 M.J. 46

May 4, 2005, Argued
September 27, 2005, Decided

COUNSEL: For Appellant: Lieutenant Jason S. Grover, JAGC, USN (argued).

For Appellee: Lieutenant Guillermo J. Rojas, JAGC, USNR (argued); Commander C. N. Purnell, JAGC, USN (on brief); Colonel William K. Lietzau, USMC.

JUDGES: BAKER, J., delivered the opinion of the Court, in which GIERKE, C.J., and CRAWFORD, EFFRON, and ERDMANN, JJ. joined.

OPINION:

Judge BAKER delivered the opinion of the Court.

Appellant was tried by a military judge alone at a general court-martial. He was charged with one specification of larceny of military property and one specification of storing stolen explosives in violation of *18 U.S.C. § 842(h)(2000)*, violations of Articles 121 and 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 921, 934 (2000)*, respectively. Appellant entered a guilty plea to the *Article 134* offense and to a part of the specification in the *Article 121* offense. n1 After a contested hearing, he was convicted of both offenses as charged. The adjudged and approved sentence included a bad-conduct discharge, confinement for sixteen months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade, E-1. The United States Navy-Marine Corps Court of Criminal Appeals affirmed Appellant's conviction and sentence. This Court subsequently granted review on the following issue:

> WHETHER THE OFFENSE TO WHICH APPELLANT PLEADED GUILTY IN THE SPECIFICATION OF CHARGE II (STORE STOLEN EXPLOSIVE MATERIALS IN VIOLATION OF *18 U.S.C. § 842(h)*) *EXCEEDED CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION IN LIGHT OF UNITED STATES v. LOPEZ, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995)*?

We conclude that *18 U.S.C. § 842(h)* is a constitutional exercise of Congress's authority under the *Commerce Clause* and is constitutional as applied to Appellant's conduct. Consequently, we affirm the decision of the Court of Criminal Appeals.

n1 Appellant reserved an evidentiary issue with regards to his guilty plea to the *Article 134* offense. This assignment of error was considered and rejected by the lower court, and was not granted as an issue before this Court.

FACTUAL BACKGROUND

Appellant was a single Navy Seal with thirteen years of service at the time of his trial. Appellant shared his rental residence with a married couple, who intended to assume Appellant's lease upon his pending separation from the Navy. While cleaning out the residence's garage, the wife discovered U.S. Government ordnance Appellant had stolen from various military training events. She contacted a senior noncommissioned officer who notified Appellant's chain of command, which subsequently recovered the ordnance from Appellant's off-base garage. According to the incident report completed upon conclusion of this recovery operation, the ordnance included signal flares, grenade simulators, smoke grenades, blasting caps, detonating cord, fuse igniters, and over 13,000 rounds of various caliber small arms ammunition. During the hearing into the providence of Appellant's guilty plea to the offense of storing stolen explosives, the following colloquy took place between the military judge and Appellant:

> MJ: And do you admit that those [explosive] items were either moving as, or were part of, or had been shipped or transported in interstate or foreign commerce?
>
> ACC: Yes, sir. I believe they had all been made and shipped prior to and in interstate commerce.

MJ: Okay. And why do you believe that?

ACC: Sir, the list that I was provided through Mr. Bash [the ordnance inventory manager for Naval Special Warfare Group One] states that these different items and lists the items specifically and shows that they were all made in states other than California, therefore, they were all shipped through interstate commerce.

MJ: Okay. So sometime prior to their being stolen materials, they were shipped in interstate commerce?

ACC: That's my understanding, yes, sir.

MJ: And by that, it's your understanding that they were made in one state and then shipped eventually into California?

ACC: Yes, sir.

MJ: Did you transport them or know personally that they were shipped between states after they were stolen?

ACC: [No response.]

MJ: Let me break that up. Did you transport them between two different states?

ACC: No, sir.

MJ: Okay. But you believe that between their manufacture and the time that they were stolen, they were shipped in interstate commerce?

ACC: Yes, sir.

MJ: And that's based on the place of their manufacture?

ACC: Yes, sir.

DISCUSSION

The granted issue tests the constitutionality of an act of Congress. Such questions are reviewed de novo. *United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000)*; *Benning v. Georgia, 391 F.3d 1299, 1303 (11th Cir. 2004).*

18 U.S.C. § 842(h) provides that:

> It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, *or which have been shipped or transported in, interstate or foreign commerce*, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

Emphasis added. Appellant argues that the statute is unconstitutional as applied to his offense because his conduct lacked a substantial nexus to interstate commerce. n2 In answer, the Government initially argues that Appellant lacks standing to assert a commerce power limitation on

Congress's authority because he is a servicemember directly subject to Congress's plenary Article I authority to regulate the military. In the alternative, the Government contends that the unlawful storage of explosives substantially affects interstate commerce and that Appellant's conduct created the precise risks that Congress adopted *18 U.S.C. § 842(h)* to regulate.

> n2 We resolve this case without deciding whether Appellant waived his right to make an as-applied challenge to the statute when he entered an unconditional guilty plea to the *Article 134* offense. See, e.g., *United States v. Dwyer, 245 F.3d 1168, 1170 (10th Cir. 2001)* ('Although [Appellant] has styled this issue as a jurisdictional challenge, he is in fact attempting to resurrect the issue of whether his weapon possession affected interstate commerce. [Appellant] waived this issue when he entered his guilty plea. By admitting in his plea agreement that 'such possession was in or affecting interstate or foreign commerce,' he admitted the interstate nexus element was satisfied.") (internal citation omitted). Waiver was not addressed by either party before the lower court. Subsequent to oral argument before this Court, Appellant filed a motion to submit a supplemental brief on the issue of waiver. The Government opposed the motion, and the Court denied it.

Standing

Section 842(h)'s jurisdictional element relies on Congress's Article I, Section 8, Clause 3 power to regulate interstate commerce. The Government contends that Appellant lacks standing to assert a constitutional challenge to this jurisdictional element because Congress has plenary

power to regulate him as a member of the United States military via its enumerated authority "to make Rules for the Government and Regulation of the land and naval Forces." *U.S. Const. art 1, § 8, cl. 14.* Thus, Congress need not rely on its *Commerce Clause* authority to reach this Appellant's conduct.

According to this logic, the offense applies in Appellant's case regardless of the constitutionality of the statute as applied to a civilian accused subject only to Congress's interstate commerce power. The broader legal implication of the Government's argument is that servicemembers would effectively be precluded from making any future jurisdictional challenge to an *Article 134, UCMJ, Clause 3* (crimes and offenses not capital) offense.

The Government's argument, however, is inconsistent with *Article 134's* text as well as Congressional intent. The plain language of *Article 134*, Clause 3 proscribes "crimes and offenses not capital, of which persons subject to this chapter may be guilty . . . ." As the Manual for Courts-Martial explains, if conduct is charged as a violation of *Article 134, Clause 3,* "the proof must establish every element of the crime or offense as required by the applicable law." Manual for Courts-Martial, United States (2000 ed.)(MCM), pt. IV, P 60.b. *Section 842(h)* contains a statutory jurisdictional element that invokes Congress's *Commerce Clause* authority. Were we to conclude that element is unconstitutional as applied to Appellant's conduct, the statute would no longer constitute a crime or offense of which he could be found guilty. Thus, the language of the specified offense itself requires that we address Appellant's claim.

Congress could have enacted legislation specifically proscribing Appellant's conduct on the basis of his status as a

servicemember. Moreover, Appellant's storage of stolen explosives could have been charged as a criminal violation under *Article 134, UCMJ, Clauses 1 and/or 2*. But in the case now before the Court, there is no indication that Congress or the charging authorities intended to except Appellant from the jurisdictional standard or element generally applicable in *18 U.S.C. § 842(h)* prosecutions. We would anticipate an express legislative statement were Congress to deprive servicemembers of the procedural right to challenge the constitutionality of statutes under which they were convicted pursuant to *Article 134, Clause 3*, a right heretofore recognized in military law and practice. See, e.g., *United States v. O'Connor, 58 M.J. 450 (C.A.A.F. 2003)* (reversing *Article 134, Clause 3* conviction for violation of federal child pornography statute on *First Amendment* grounds). Absent such indication, we conclude that Appellant has standing to challenge the constitutionality of the statute on *Commerce Clause* grounds.

Merits

While Appellant has standing to make his claim, we conclude that his attack on the statute's constitutionality, as applied to his conduct, fails. Congress may regulate three broad categories of conduct pursuant to its commerce power: the channels of interstate commerce, such as highways and rail lines; the instrumentalities of interstate commerce, or persons or things in interstate commerce, such as vehicles and goods; and those activities that substantially affect interstate commerce, such as intrastate coal mining or hotels catering to interstate guests. *United States v. Lopez, 514 U.S. 549, 558, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).* "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on

interstate commerce." *Gonzales v. Raich, 162 L. Ed. 2d 1, 125 S. Ct. 2195, 2205 (2005).*

Through the middle decades of the twentieth century, U.S. courts commonly sustained Congressional authority pursuant to this power. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964); Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942).* In the 1995 Lopez case, however, the Supreme Court ruled that a federal criminal statute prohibiting possession of firearms on private, public, and parochial school campuses had an inadequate nexus to interstate or foreign commerce to warrant the exercise of Congressional authority, and consequently intruded on regulatory domain reserved to the various states' general police power through the *Tenth Amendment*:

> These are not precise formulations, and in the nature of things they cannot be. But . . . the possession of a gun in a local school zone is in no sense an economic activity. . . Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

514 U.S. at 567. Similarly, in *United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000)*, the Court concluded that a federal civil cause of action for victims of violent crime against women exceeded the scope of Congress's commerce authority:

> The Constitution requires a distinction between what is truly national and what is truly local . . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

Id. at 617-18.

In these decisions, the Court identified four considerations informing its analysis of whether a regulated activity substantially affects interstate commerce: (1) whether the statute regulates economic or non-economic activity; (2) whether the statute contains an express jurisdictional element; (3) whether Congress made findings regarding the connection to interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. *Id. at 609-12.*

In the present case, Appellant seeks to draw on the federalism concerns articulated in Lopez and Morrison to challenge the jurisdictional basis of his conviction for storing stolen explosives. n3 In particular, he maintains, that his intrastate storage of stolen explosives in his garage was an inherently local activity which did not substantially affect interstate commerce.

> n3 The Court decided Gonzalez subsequent to the final submission of briefs and oral argument in this case. The Court rejected an as-applied challenge to Congress's power to regulate the intrastate production of medicinal marijuana. Although the outcome differs from the results in Lopez and Morrison, the analytic

framework, in our view, is consistent with that used in *Lopez* and Morrison.

We disagree. As a threshold matter we conclude that *18 U.S.C. § 842(h)* is a constitutional exercise of the Congressional Commerce power. *United States v. Mikels, No. 96-10204, 1997 U.S. App. LEXIS 5967, at *6, 1997 WL 143965, at *2 (9th Cir. Mar 26, 1997)* (unpublished); *United States v. Folen, 84 F.3d 1103 (8th Cir. 1996).* As elaborated further in our as-applied analysis below, the disposition of stolen explosives "which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce" clearly falls within the scope of Congress's enumerated Article I, Section 8 regulatory powers.

Applying the analytic framework identified in Morrison, we are further satisfied that *18 U.S.C. § 842(h)* is constitutional as applied to Appellant's conduct. First, we conclude that the statute regulates economic activity, and that Appellant's conduct fell within the scope of this regulated activity. In Lopez, the Court's determination that the statute criminalizing possession of a handgun on school property did not regulate economic activity was strongly informed by the "stand alone" character of the crime. *514 U.S. at 561* ("[The statute] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. [The statute] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."). In contrast, *§ 842(h)* was enacted as an essential part of a comprehensive federal legislative scheme to effectively regulate the sale, storage, transfer, or other disposition of explosives in

interstate commerce. See *18 U.S.C. § 841*. Moreover, as the Supreme Court recently reiterated:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.

Gonzales, 125 S. Ct. at 2205-06 (internal citations omitted).

Second, the statute includes an express jurisdictional element, adopted subsequent to the Court's Lopez decision. Further, Appellant conceded this element at trial when he stated that the contraband had moved in interstate or foreign commerce because it had been produced outside of California (the locus of the crime).

Third, the stated purpose of *§ 842(h)* and the statute's associated legislative history demonstrate that Congress found the illegal use and unsafe storage of contraband explosives to be a substantial hazard to interstate commerce. Pub. L. No. 91-452, § 1102, 84 Stat. 922 (1970); H.R. Rep.

No. 91-1549 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4013 ("Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation."). Thus, Congress enacted the statute as part of a regulatory scheme intended to:

> protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials.

1970 U.S.C.A.A.N. at 4013. In Morrison, the Court looked beyond Congress's stated finding that gender motivated violence substantially affected interstate commerce, concluding that the substantial affects test "ultimately presents a judicial rather than a legislative question . . . ." *Morrison, 529 U.S. at 614*. However, Appellant's argument fails to even address the differences between the majority and the dissent in Morrison over the degree of judicial deference properly afforded to Congressional findings because it is patently obvious that the misuse and unsafe or insecure storage of explosive materials substantially affect interstate commerce. This is a conclusion easily reached before September 11th, 2001, and it is easily reached after that catastrophic day.

Fourth, we are satisfied that there is a rational basis for concluding that Appellant's storage of stolen explosives has substantial direct implications for commerce. *Gonzales, 125 S. Ct. at 2197* ("The Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."). Regardless of the

actual impact of Appellant's particular conduct, his storage of stolen explosives fell within a class of commercial activity within Congress's power to regulate. Id. ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.") (internal citations omitted). Appellant's actions diverted explosives out of the legal interstate market where they could be monitored and regulated and diverted them to his garage where federal regulations no longer applied regarding their storage or possible reentry into the marketplace.

Finally, we note that our conclusion is in accord with the decision of every court that has considered this issue in regards to *18 U.S.C. § 842(h)* post-Lopez. *See Mikels, U.S. App. LEXIS 5967, 1997 WL 143965*; *Folen, 84 F.3d 1103*; see also *United States v. Kirk, 1997 U.S. App. LEXIS 12670 (5th Cir. 1997)* (citing analysis in *United States v. Dawson, 467 F.2d 668 (8th Cir. 1972)*, to reject Lopez challenge to federal criminal statute regulating possession of machine guns).

Accordingly, we affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals.

APPENDIX B

UNITED STATES v. Walter D. DISNEY, Hospital Corpsman First Class (E-6), U.S. Navy

NMCCA 200100932

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

August 31, 2004, Decided

COUNSEL: LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel.

LT JASON GROVER, JAGC, USN, Appellate Defense Counsel.

LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE C.L. CARVER, D.A. WAGNER, R.W. REDCLIFF. Judge REDCLIFF did not participate in the decision of this case.

OPINION: CARVER, Senior Judge:

Pursuant to mixed pleas, the appellant was convicted by the military judge alone, sitting as a general court-martial, of larceny of ordnance and related military equipment and illegally storing stolen explosive materials in violation of *18 U.S.C. § 842(h)*, in violation of Articles 121 and 134, Uniform Code of Military Justice, *10 U.S.C. § § 921* and

934. The appellant was sentenced to a bad-conduct discharge, confinement for 16 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant claims that (1) the federal criminal statute in question was unconstitutional and (2) he was prejudiced by improper evidence during sentencing.

After carefully considering the record of trial, the appellant's assignments of error, n1 and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ.*

n1 The appellant filed a Motion for Expedited Appellate Review on 9 Jul 2004. That motion is now moot.

Unconstitutionality of Federal Statute

In his first assignment of error, the appellant contends that *18 U.S.C. § 842(h)* is unconstitutional since Congress exceeded its authority under the *Commerce Clause of the U.S. Constitution* when it criminalized local, intrastate possession and storage of explosives and that therefore we must dismiss Charge II and its Specification. We disagree and decline to grant relief.

The federal statute provides that

> It shall be unlawful for any person to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, or pledge or accept as security

> for a loan, any stolen explosive materials which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen.

18 U.S.C. § 842(h). During the providence inquiry, the appellant admitted that he stole explosive materials from the U.S. Navy and stored them in his off base house. He further admitted that the ordnance had been transported in interstate commerce from the manufacturer to the U.S. Navy.

The appellant now contends that this statute is unconstitutional because there is no nexus between the prohibited conduct and interstate commerce that is "more than the mere fact that the contraband had traveled in interstate commerce at some point in time," relying upon *United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995).* Appellant's Brief of 30 Sep 2002 at 6. In *Lopez,* the Supreme Court held that a portion of the *Gun-Free School Zones Act of 1990,* which prohibited the possession of a firearm in a school zone, *18 U.S.C. § 922(q),* was invalid because the statute contained no jurisdictional element that would ensure that the possession had the requisite nexus with interstate commerce. But we find that *Lopez* is distinguishable because *§ 842(h),* unlike *§ 922(q),* does contain the necessary jurisdictional element requiring the Government to prove that the materials had been transported in interstate commerce.

We could find only one federal case directly on point. The 8th Circuit opined that *§ 842(h)* was constitutionally valid, finding that there was a "rational basis upon which Congress properly could have determined that the misuse of

explosive materials is one activity which, as a class, affects commerce . . . ." *U.S. v. Dawson, 467 F.2d 668, 673 (8th Cir. 1972), cert. denied, 410 U.S. 956, 35 L. Ed. 2d 689, 93 S. Ct. 1427 (1973).* The court held that there was no requirement of a nexus between the conduct and interstate commerce.

> Once it is determined that a given class of intrastate activity substantially affects the commerce, or the exercise of congressional power over it, there need not be proof that an isolated activity within that class itself has an effect on commerce.

Id. at 671. We agree with the *Dawson* opinion that *§ 842(h)* is constitutional.

Improper Sentencing Evidence

In his second assignment of error, the appellant claims that he was improperly prejudiced by the testimony of a Government witness in aggravation who introduced unlawful command influence by a flag officer into the proceedings. We decline to grant relief.

The testimony at issue is that of Commander (CDR) Campion, appellant's commanding officer. The appellant did not object at trial, n2 but now complains that the testimony of CDR Campion improperly impinged on the independence of the military judge's ability to properly carry out the sentence proceeding. CDR Campion opined that in appellant's case, a "significant signal" needed to be sent "because things like this cannot continue." Record at 469. He also stated that individuals who had committed similar crimes had been incarcerated. Record at 483. Finally, CDR Campion testified that the appellant's actions, along with other similar incidents that had recently occurred within the SEALs, led the

Commanding officers of WARCOM to hold a meeting discussing ordnance accountability:

> . Sir, as the Commanding Officer, are you aware of the command's and the community's feelings and concerns regarding the incident and the material that was involved?
>
> A. Well, I think that there -- there are several different concerns there. The ammo is a concern and, like I stated before, a certain amount would not have been a problem. Okay.
>
> . . . .
>
> Because of these incidents, this became a very high level thing WARCOM down. WARCOM Commander, Naval Special Warfare Command is in charge of all the SEALs and all of Naval Special Warfare. With the rash of incidents, he had all the commander [sic] officers down there in his conference room to talk about ordnance accountability. Okay. So that's why I say, when I talk about the community's feelings, I can tell you community feelings. Okay. That's where that comes from. It's not, you know, from my hip; that's from the admiral's mouth.
>
> Q. And what are those community feelings, sir?
>
> A. Well, there are several. One is that, you know the rounds is [sic] one thing. The number of rounds takes it to another realm. Okay. So now there's more concern. With each new thing that you add there, there's a heightened concern.

> Okay. You get the demol., now all of a sudden you're into a -- you know, you're out there in a whole different ball park. Now you put the caps with that, have M-60's, so you have sensitized that cord, meaning you have explosives ready to go and now you -- you've reached the outer limits. Okay. It doesn't matter if it's a thimble full or if it's a truckload, it's the same kind of thing. And guys in the community that have gotten caught with demol. are in jail.

Record at 481-83.

> n2 The trial defense counsel (TDC) initially objected that there was an improper foundation for the witness to state the concerns of the community. But, when the TDC realized that the term community was limited to the special warfare community, he withdrew his objection. Record at 582.

We review issues involving unlawful command influence de novo. *United States v. Argo, 46 M.J. 454, 457 (C.A.A.F. 1997).* Unlawful command influence is an error of constitutional dimension; we may not affirm the findings or the sentence in the appellant's case unless we are "persuaded beyond a reasonable doubt that each [fact finder has] not been affected by [unlawful] command influence." *United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999); see Argo, 46 M.J. at 457; United States v. Thomas, 22 M.J. 388, 393-94 (C.M.A. 1986), cert. denied, 479 U.S. 1085, 94 L. Ed. 2d 146, 107 S. Ct. 1289 (1987).* Our superior court found that:

> The threshold for raising the issue at trial is low, but more than mere allegation or speculation. . . . The evidentiary standard for raising the issue [is] the same as required to raise an issue of fact, i.e., "some evidence."
>
> . . . .
>
> Once the issue is raised at the trial level, the burden shifts to the Government, which may . . . show that unlawful command influence will not affect the proceedings.

Biagase, 50 M.J. at 150.

We initially note that the issue was never raised at trial. Only in limited circumstances will the issue of unlawful command influence be preserved for appellate review in the absence of raising the issue at trial. Those limited circumstances include when a party is deterred by unlawful command influence from raising the issue. *United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994).* In this case, there is no allegation that the appellant was deprived of the facts that may have constituted unlawful command influence, nor has there been an allegation that unlawful command influence existed which prevented the appellant from raising the issue at trial, therefore it is waived.

Assuming that the issue was not waived, we will nonetheless grant no relief because the appellant has failed to meet the minimum showing under *Biagase*. On appellate review, the appellant must show that "the proceedings [were] unfair and the unlawful command influence was the cause of the . . . unfairness." *United States v. Ayers, 54 M.J. 85, 95 (C.A.A.F. 2000).* Although the appellant must only "show []

facts which, if true, would constitute unlawful command influence," *United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999)*, the "quantum of evidence required to raise the issue is . . . more than mere allegation or speculation." *Ayers, 54 M.J. at 95; accord United States v. Baldwin, 54 M.J. 308, 311 (C.A.A.F. 2001), Biagase, 50 M.J. at 150.*

Even if CDR Campion's testimony could be said to be improper, it did not make the proceedings unfair because it did not affect the findings and sentence. The military judge stated:

> There have been some matters that improperly came before the court, and the court will disregard those in sentencing . . . . There was some testimony that discussed the type and/or amount of punishment that might be appropriate in this case, and the court will specifically exclude from any consideration any of that testimony.

Record at 656. Our Superior Court has held in the past that "[a] military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence..." *United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000).* This presumption, along with the military judge's statements on the record, lead us to conclude that unlawful command influence did not influence the appellant's sentencing proceeding in any way.

We find that CDR Campion essentially testified that the flag officer had concerns about the accountability of ordnance and that improperly secured ordnance could result in an explosion. We believe that the trial counsel could have argued those common sense matters even without that

testimony. We specifically find no evidence of either actual or apparent unlawful command influence.

Conclusion

Accordingly, the findings of guilty and sentence, as approved below, are affirmed.

Judge WAGNER concurs.

Judge REDCLIFF did not participate in the decision of this case.